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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Jacqueline Scott Corley, Judge

IN RE: FACEBOOK, INC. )  
CONSUMER PRIVACY USER ) NO. 18-MD-02843 VC (JSC)  
PROFILE LITIGATION. )  
\_\_\_\_\_ )

San Francisco, California  
Thursday, November 5, 2020

TRANSCRIPT OF ZOOM TELECONFERENCE PROCEEDINGS

APPEARANCES:

For Plaintiffs:

KELLER ROHRBACK LLP  
1201 Third Avenue - Suite 3200  
Seattle, Washington 98101  
BY: DEREK LOESER, ESQ.  
CARI LAUFENBERG, ESQ.  
DAVID KO, ESQ.

BLEICHMAR FONTI & AULD LLP  
555 12th Street - Suite 1600.  
Oakland, California 94607  
BY: LESLEY WEAVER, ESQ.  
ANNE K. DAVIS, ESQ.  
MATTHEW MONTGOMERY, ESQ.

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

Reported By: Ruth Levine Ekhaus, RDR, FCRR  
Official Reporter, CSR No. 12219

**APPEARANCES:** (CONTINUED)

For Defendants:

GIBSON, DUNN & CRUTCHER LLP  
333 South Grand Avenue  
Los Angeles, California 90071

**BY: DEBORAH STEIN, ESQ.**

GIBSON, DUNN & CRUTCHER LLP  
555 Mission Street - Suite 300  
San Francisco, California 94105

**BY: MARTIE KUTSCHER CLARK, ESQ.  
JOSHUA LIPSHUTZ, ESQ.**

GIBSON, DUNN & CRUTCHER LLP  
2100 MCKINNEY AVENUE - SUITE 1100  
Dallas, Texas 75201

**BY: RUSSELL FALCONER, ESQ.**

GIBSON, DUNN & CRUTCHER LLP  
200 Park Avenue  
New York, New York 10166-0193

**BY: ORIN SNYDER, ESQ.**

Thursday - November 5, 2020

11:00 a.m.

P R O C E E D I N G S

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**THE CLERK:** Are we ready?

**THE COURT:** I believe so.

**THE CLERK:** Calling Civil Action 18-MD-2843, In Re:  
Facebook, Inc.

Counsel, starting with plaintiffs -- can one of you do all  
the appearances for the court reporter?

**MS. WEAVER:** You can do the honors, Derek.

**MR. LOESER:** You know, go ahead. I'm trying to get my  
gallery to work here.

**MS. WEAVER:** He's not sure who all these people are.

**MR. LOESER:** Wait. No. I got it working now.

Yes, this is Derek Loeser from Keller Rorhback for  
plaintiffs. With me is Cari Laufenberg and David Ko, also from  
Keller Rohrbach. And from BFA, is Lesley Weaver and Anne Davis  
and Matt Montgomery.

**THE COURT:** Good morning.

**MS. WEAVER:** Good morning.

**MR. LOESER:** Good morning, Your Honor.

**THE CLERK:** And for defendants, Ms. Stein?

**MR. SNYDER:** It's Orin Snyder, Deborah Stein, Russ  
Falconer, Josh Lipshutz, and Martie Kutscher Clark. We have a  
big group today because we needed to peel away from CNN or else

1 our brains were going to explode.

2 So good to see you, Judge. Happy post-Election Day.

3 **THE COURT:** All right. Good afternoon.

4 Okay. Everyone is -- well, I think there is unbelievable  
5 chaos. We have neglected to note that yesterday there were  
6 over 100,000 new COVID cases diagnosed in the United States.  
7 There is just a lot going on. So we'll distract ourselves for  
8 a little bit with this case.

9 So let's start with the search terms. And plaintiffs  
10 believe that you guys are mostly on the same page, except for  
11 the two issues. Facebook seemed to think they weren't.

12 I do have the exhibits in front of me, but let's start  
13 with -- plaintiffs identified two issues. One is the custodian  
14 negotiations. Let's just start with something. I resolved --  
15 for those first 38 custodians, we resolved the search terms.

16 **MS. WEAVER:** Unfortunately, Your Honor, we do have  
17 some open questions, notwithstanding your ruling, as to which  
18 custodians the search terms applied.

19 **THE COURT:** No, I understand that's your position.  
20 I'm saying: No, you don't.

21 It was presented to me by custodian; that's it. That's  
22 it. We're now moving on to the next group.

23 **MS. WEAVER:** Great.

24 **THE COURT:** And the issue here with the next group is  
25 the plaintiffs wanted the search terms, I guess, to apply to

1 each group, Group 5, Group 6, Group 7, or 8. And Facebook  
2 says: No, it's custodian-specific.

3 I went back to Docket Number 461, which is what the  
4 parties stipulated to. And what that says is that parties  
5 agreed to -- that Facebook would provide search terms for the  
6 custodians in each group; not search terms for each group, for  
7 the custodians in each group.

8 So I think, though, the plaintiffs' concern, namely, is  
9 time. We can address that and decide as to when it needs to be  
10 done and presented.

11 I mean, the alternative -- I mean, frankly, I would think  
12 that Facebook might want to just do it by group. It may have  
13 less yield; it seems it would be easier. But for the  
14 plaintiffs, it seems, for you, it may have less yield to do it  
15 that way. But, that's -- I think what the parties agreed to  
16 was by custodian.

17 **MS. WEAVER:** I mean, if I may just address that.

18 If we weren't doing it by groups, what was the purpose of  
19 the grouping?

20 **THE COURT:** Well, I think the plaintiffs said --  
21 Facebook said what the purpose was. I mean, that's why --

22 **MS. WEAVER:** Which was? I don't understand.

23 **THE COURT:** -- in their views that -- their purpose of  
24 doing it.

25 I mean, I guess, I don't understand why you want to do it

1 by group if they are saying that group isn't going to hit the  
2 most yield.

3 **MS. WEAVER:** Because we think it's simpler. Because  
4 we get bogged down. We really just want to move through.

5 We want to press forward, Your Honor. And what we found  
6 is that haggling about individual people on top of the search  
7 terms themselves, and getting those hit reports, and then we  
8 would want an aggregate hit report -- and it just got very,  
9 very complicated.

10 And, frankly, we've never done it this way in any case.  
11 So we were trying to find a way to streamline, but -- so if  
12 that's what Your Honor orders, so be it. We'll move in forward  
13 as best we can.

14 **THE COURT:** We're going to have deadlines so it will  
15 reduce the ability to haggle --

16 **MS. WEAVER:** Okay.

17 **THE COURT:** -- as to that.

18 And the second issue you raised was starting the  
19 production. And the production starts now with those 38. I  
20 would have never agreed to that process if that was the case.  
21 And I don't know if that's an issue, but it starts now. So  
22 Facebook should be moving now.

23 **MR. SNYDER:** No issue, Judge.

24 **THE COURT:** Okay.

25 **MR. SNYDER:** No issue.

1       No, we're delighted. The only reason we weren't able to  
2       start is because we thought we were going to have to  
3       renegotiate those 38; but, Your Honor, just clarified that. So  
4       we're ready to go and we are in unison with the plaintiffs that  
5       we want to get agreement on everything, produce our documents,  
6       and then move to the next stage of the litigation.

7               **THE COURT:** Right. But when you say "agreement on  
8       everything," you're not waiting for production with respect to  
9       the first 38 for agreement on everything? Okay. All right.

10              **MR. SNYDER:** No, Your Honor.

11              **THE COURT:** All right. I need to -- all right.

12       So now what we need to, then, talk about are the  
13       additional search terms for the additional custodians.

14       And as to request for production of documents, which was  
15       filed, I guess, this summer, submitted this summer -- and  
16       I believe which Mr. Loeser told me there was some amount that  
17       wouldn't have been included in the initial search terms, but  
18       that it wouldn't be a large amount; there was some.

19       It seems to me that when negotiating for these additional  
20       custodians, those RFPs should be included. It doesn't make any  
21       sense, since these haven't been negotiated. But it shouldn't  
22       be that much. But we -- I think it should be included in there  
23       when you agree on certain terms, all those RFPs should be  
24       there. That's the most efficient thing.

25       Does anyone disagree with that?

1           **MS. KUTSCHER CLARK:** Your Honor, the concern we have  
2 is that plaintiffs had represented previously that those RFPs  
3 were covered, in large part, by the search string that were  
4 already negotiated. And when we were negotiating the strings  
5 last time, plaintiffs assured the Court that most of them were  
6 incorporated in what we were negotiating.

7           And our concern was that, as soon as those negotiations  
8 concluded, plaintiffs said: Oh, wait. We now have these 26  
9 other RFPs. We want to negotiate new strings for them. We  
10 want more targeted collection for them.

11           And we had understood, as was represented before, that  
12 they were part of what had already been negotiated, or at least  
13 most of them.

14           **MS. WEAVER:** Your Honor, may I just respond?

15           **THE COURT:** Right. But didn't Mr. Loeser just say --  
16 I think it was Mr. Loeser -- that there were some that were  
17 not. So it wasn't all, but there were some.

18           **MS. WEAVER:** Just to clarify, Your Honor, we're a  
19 little confused by what Facebook means by the 26 RFPs.

20           We did propound -- as a result of our meet and confer with  
21 Facebook, sometimes they said to us, when we thought we could  
22 do targeted document collections: Oh, we should use search  
23 terms or something like that.

24           So in the middle these negotiations, we propounded new  
25 RFPs, RFP Sets 3 and 4. And our under- -- the search terms we



1 drafted did encompass almost all of those, except for four  
2 RFPs.

3 So we did invite Facebook to meet and confer about this  
4 when we put in the statement last week, because we really  
5 didn't understand what they mean by 26. But we agreed, they  
6 should be included.

7 We do think there is some additional topics also in these  
8 custodial buckets because the custodians in Group 5 through 8  
9 have different job positions that weren't previously covered.  
10 So that's why we were proposing -- you know, we need to see  
11 Facebook's counter-proposal, but that we would counter with 35  
12 new strings limited to that, to cover these new topics.

13 **MS. KUTSCHER CLARK:** Your Honor, if --

14 **MS. DAVIS:** Your Honor, if I may --

15 **THE COURT:** Okay.

16 (Unreportable cross-talk.)

17 **MS. KUTSCHER CLARK:** -- plaintiff's are saying that  
18 all but four RFPs are covered by the strings that have already  
19 been negotiated, we can certainly live with that. That wasn't  
20 our understanding based on our meet and confer earlier this  
21 week. But if there are only four RFPs that are not covered by  
22 the previously negotiated search strings, we are fine with  
23 that.

24 We would like to know what those four RFPs are. I don't  
25 think we know what they are. But our concern was that

1 plaintiffs wanted to negotiate new strings for many, many more  
2 RFPs than that.

3           **THE COURT:** The issue really is the number of new  
4 strings; right? That's the issue.

5           **MS. WEAVER:** Yes.

6           **THE COURT:** All I'm saying is: All those RFPs should  
7 be encompassed within it for these -- since we're just  
8 negotiating those now.

9           **MR. LOESER:** Thank you, Your Honor.

10           **MS. DAVIS:** Your Honor, if I may.

11           There are, of course, some RFPs for which targeted  
12 collections are appropriate. And some sources of ESI that  
13 Facebook has not proposed defined search terms to.

14           So, you know, I want to be very clear that while we  
15 proposed search terms for those RFPs for which search terms are  
16 appropriate, there are some where search terms are not  
17 appropriate. And there are some sources of ESI that Facebook  
18 is not going to apply search terms to.

19           **THE COURT:** Okay. All I want to do is just get  
20 through the search terms, and get that done, and get that  
21 going. And then we can address --

22           **MS. WEAVER:** We agree.

23           **THE COURT:** -- that other stuff.

24           Okay. So then at the end -- then we need to go through  
25 your proposals. But I'll just tell you my views and then we

1 can sort of figure it out.

2 There was an issue -- well, let's do search terms then,  
3 because I think that takes care of discussing about it. So  
4 let's look at your -- each proposal then and tell me, then,  
5 where there are other points of difference that we should  
6 address.

7 So the paragraph 2, your each paragraph 2, it sounds like  
8 the plaintiffs are agreeing to start with the terms from the  
9 first 38.

10 **MS. WEAVER:** Yes.

11 **MS. KUTSCHER CLARK:** Yes. And, Your Honor, I think  
12 the main question we're talking about is how many new terms can  
13 be proposed in addition to the 100-ish -- I think the number is  
14 approximately 100 -- that the parties have already agreed to or  
15 that the Court has ordered. And the delta we're talking about  
16 here might seem insignificant, so I think it's worth explaining  
17 a little why we're concerned about it.

18 **THE COURT:** Well, let me just -- stop. Can I just  
19 stop you?

20 I'm sorry to be short, but today is, like, just discovery  
21 all day long. And I just think you people need decisions, so  
22 that's where I'm going to get.

23 **MS. KUTSCHER CLARK:** Sure.

24 **THE COURT:** To be candid, sometimes the decisions will  
25 be arbitrary, but in the end it actually will make no

1 difference. I promise.

2 MS. KUTSCHER CLARK: Understood.

3 THE COURT: Ms. Weaver, you said something about 35  
4 additional search terms.

5 MS. WEAVER: Yes.

6 THE COURT: Is that what you're proposing in addition  
7 to the hundred?

8 MS. WEAVER: Yes. We see two buckets: the 103 capped  
9 at 103, and then the second bucket would be capped at 35.

10 THE COURT: Okay. That seems reasonable. Okay.

11 MS. KUTSCHER CLARK: Your Honor, where I would ask for  
12 a little clarity is one of the concerns we raised to plaintiffs  
13 was that we were concerned that they might take many of the  
14 strings that had been proposed previously, add a bunch of  
15 or-connectors, and propose them as a single string. So we  
16 would end up seeing what was previously 100 strings, now  
17 proposed as 35 strings.

18 And we asked plaintiffs to clarify that they would not do  
19 that, and they did not provide that certainty. So that's part  
20 of why we're a little concerned about the 35 strings.

21 MS. WEAVER: I guess, what we would say, Your Honor,  
22 is that we need the freedom -- some of -- in negotiating, we  
23 agreed to forego certain search strings because we thought they  
24 were coming up in this future buckets. So to say anything that  
25 was not included but earlier proposed, A, will just cause

1 further dispute; and, B, really does a disservice to us. We  
2 want to be able to pick whatever 35 strings we want that are  
3 new, that are not the 103.

4 **THE COURT:** But, in the end, I'm going to decide; so  
5 there we are.

6 **MS. WEAVER:** Okay.

7 **THE COURT:** So everybody has an incentive to be  
8 reasonable.

9 **MS. WEAVER:** Okay.

10 **THE COURT:** Okay. Well, I don't have to decide if you  
11 agree; but in the end, I may have to decide.

12 All right.

13 **MR. SNYDER:** Judge, we just rules and we want  
14 deadlines. And we will --

15 **MS. WEAVER:** Exactly.

16 **MR. SNYDER:** -- act accordingly.

17 **THE COURT:** That's what we're doing.

18 So then paragraph 2, then, is there any disagreement now  
19 that I need to resolve?

20 **MS. KUTSCHER CLARK:** No.

21 **THE COURT:** No. Okay. We have a court reporter; you  
22 guys said, "no." Okay.

23 (Laughter.)

24 Paragraph 3 --

25 **MS. KUTSCHER CLARK:** I speak for all of the parties.

1           **THE COURT:** How about paragraph 3?

2           **MS. KUTSCHER CLARK:** I think the one concern there  
3 that we have is the deadline for providing hit counts.  
4 Facebook is going to provide hit counts as soon as we have  
5 them, and as soon as they're ready.

6           What we have found is that hit counts are extremely  
7 time-consuming and complex to prepare. I know last round our  
8 vendor spent over 500 hours preparing hit counts, so sometimes  
9 they cannot feasibly be done within five days. Our proposal  
10 says we'll provide them as soon as they are available, and in  
11 no case longer than 10 days; but we'll do them as soon as we  
12 possibly can, and get them out the door.

13           **MS. WEAVER:** We don't really understand why these  
14 terms would take longer, especially when -- well, it seems like  
15 there would be many fewer because we're starting with a venire  
16 at this point of 103, plus 35 max, whereas before, we were  
17 starting with a pool much larger.

18           Just, you know, we want to get through this. We want to  
19 move forward. We want to be fair and give people the time they  
20 need to do what they need to do; but we haven't really received  
21 an explanation why a fewer number of strings would take twice  
22 as long.

23           **THE COURT:** I know, but we're talking about five days.  
24 Not just -- fine. 10 days. No more than 10 days. Right? I  
25 mean, think about it.

1           **MR. SNYDER:** Life is short.

2                           (Unreportable cross-talk.)

3           **MS. KUTSCHER CLARK:** If they are ready in five days,  
4 we'll send them out.

5           **THE COURT:** Yeah. If we were -- they are working,  
6 starting now, producing on those first 38, so it's not like  
7 nothing is happening. There should be stuff happening and at  
8 the same time.

9           Okay. So, then, paragraph 3, then, is resolved? Okay.

10          It looks like --

11          **MS. WEAVER:** I think. So I want to hear affirmative  
12 answers from Anne.

13          **THE COURT:** Ms. Davis? You're on mute.

14          **MS. WEAVER:** Is it resolved?

15          You're still on mute.

16          **MS. DAVIS:** It is my special gift.

17          I think, that's right, it's resolved with the  
18 understanding that we're trying to move this forward.

19          **THE COURT:** Okay. All right. Paragraph 4. It looks  
20 fine; right?

21          **MS. DAVIS:** Hm-hmm.

22          **THE COURT:** Okay. Great. Paragraph 5 is it -- when  
23 does that one week or two weeks start?

24          **MS. WEAVER:** Following Facebook's response to  
25 plaintiffs' counterproposal; is that right?

1           **MS. KUTSCHER CLARK:** That was my understanding, yes.

2           **MS. WEAVER:** Okay. We're okay with that, Ms. Davis?

3           You're on mute.

4           **MS. DAVIS:** So I think it should start after Facebook  
5 provides its response and, with that, the delivery of the hit  
6 counts.

7           **THE COURT:** Okay. All right.

8           I think that one week is fine. It will force compromise  
9 and decision-making and all that. So we'll do one week there.

10          But plaintiffs' paragraph 5 is longer. So what else is in  
11 dispute there?

12          **MS. DAVIS:** We had shortened the period to one week.  
13 We had sought updated hit counts on the competing proposals so  
14 we had sufficient data to move forward. And then I think we  
15 had some differences in terms of statistical sampling.

16          **MS. WEAVER:** We're not there yet.

17          **MS. DAVIS:** Well, we included it in paragraph 5.

18          **MS. WEAVER:** Right. I see.

19          **MS. DAVIS:** Yes.

20          **THE COURT:** So I didn't mean to, like, muck anything  
21 up with the statistical sampling. So that's fine, if you -- so  
22 all I was just -- what was concerning -- what I was concerned  
23 about and wasn't sure was happening was that you get these hit  
24 counts and then you see it's pulling up all these irrelevant  
25 things; that's what I just meant, and that you narrow it



1 further. It just wasn't clear to me that that was happening.

2 If that's happening fine. Or if you don't want to do it,  
3 I don't want to muck things up.

4 **MR. LOESER:** Your Honor, Derek Loeser.

5 The sampling issue and it's -- there is different types of  
6 sampling. And, you know, where it's come up and been useful is  
7 when, in other cases, when there is a dispute about a string  
8 and a party is saying that this string is improper because it  
9 will result in a large collection of irrelevant materials, you  
10 can use random sampling to sort that out.

11 And what we would suggest is that this is something that  
12 may not be necessary in this case; it depends how the  
13 negotiations go on the strings. But if there is a string and  
14 if Facebook is claiming, based upon the hit count -- as it has  
15 for many strings -- this will result it a huge pull of  
16 irrelevant information, that would be the appropriate use of  
17 the random sampling, just to determine if that's true or not.

18 **MS. WEAVER:** And not to parse words, but random  
19 sampling is different than, perhaps, what Facebook -- the ESI  
20 protocol provides for an ESI procedure on random sampling. And  
21 we wouldn't want to open negotiations on to what statistical  
22 sampling is and make it more complicated now. So we would just  
23 rely on the protocol.

24 Is that what you were going to say, Ms. Davis? I'm sorry.

25 **MS. DAVIS:** In part, yes.

1 But also that, you know, that sampling can inform further  
2 narrowing or clarifying of terms, and we think it's useful in  
3 that way. So I think if the parties can agree and it can be  
4 timely done, then we can, you know, discuss and come to an  
5 agreement on that, you know. Or, perhaps, it won't end up  
6 being useful and we'll be in agreement; but I think that's the  
7 primary difference between our proposals.

8 And, you know, if we can discuss it and come to agreement  
9 on the sort of random sampling, and move forward from there in  
10 the negotiations, then it may be useful. It may not.

11 **THE COURT:** Ms. Kutscher, you wanted to say something?

12 **MS. KUTSCHER CLARK:** Yeah.

13 Your Honor, we would like to do the statistical sampling;  
14 we think it could be helpful.

15 Our concern on the last round was that the search terms or  
16 the search strings themselves were shifting and changing,  
17 literally, until the night before we submitted our dispute. So  
18 there was no opportunity where we could reliably do sampling  
19 because the terms were constantly in flux.

20 So we would like a process by which there is a moment  
21 where the strings are final enough that we have time to do the  
22 sampling knowing that the strings are not still changing while  
23 we're doing it.

24 **MR. LOESER:** And, again, Your Honor, this would just  
25 be something that's used if the parties can't resolve a

1 particular type of dispute about a string. So that would seem  
2 to be the time to utilize the procedure. And -- yeah.

3 And, again, you're hearing from a literature major now  
4 talking about statistics, but Mark Twain referred to them as  
5 "lies, damn lies, and statistics," so it is important to  
6 understand how the sampling is done, and here it would be  
7 random; but, you know, the parties can sort that out.

8 **THE COURT:** Can you?

9 (Laughter.)

10 **MR. LOESER:** We can try.

11 **MS. WEAVER:** Anything is possible.

12 **THE COURT:** So just with paragraph 5, then, I guess I  
13 don't -- is there a timing disagreement or what is the  
14 disagreement? So you're going to make your best and final  
15 offers and then -- so that's it. That's what it is.

16 And then Facebook then wants to do, at least for some of  
17 them that they think, perhaps -- maybe not all as Mr. Loeser  
18 says, some may agree, some may be fine. But if you believe  
19 that they're coming up with too many irrelevant documents, then  
20 what?

21 **MR. LOESER:** Then that would be -- yeah. I'm sorry.  
22 You're hearing from lots of different people on the issue, but  
23 I'll be quiet for a minute.

24 **MS. DAVIS:** Your Honor, if I may jump in.

25 I think our concern is that, you know, that sampling

1 should aid the parties in narrowing a term as appropriate,  
2 instead of being used to simply knock out a term.

3           **THE COURT:** Oh, yes. Well, that was the point of the  
4 sampling. So I am --

5           **MS. DAVIS:** Right.

6           **THE COURT:** But I'm sensitive to Facebook's thing; we  
7 shouldn't be changing the night before. But, of course, the  
8 sampling should result in narrowing, not "Gotcha. You don't  
9 get it." Right?

10           So what would be, then, Ms. Kutscher, your proposal?

11           You do your sampling, where appropriate, not every one,  
12 where appropriate; then what?

13           **MS. KUTSCHER CLARK:** Right. I think if a term is  
14 revised, but Facebook continues to believe it's overbroad, we  
15 would need an opportunity to do more sampling on it. Because  
16 what we don't want to happen is that we put a lot of time and  
17 effort into sampling a particular string, it gets tweaked  
18 slightly, and then the sampling is no longer accurate so we  
19 can't rely on it.

20           So I think there would just -- and maybe this is something  
21 the parties should meet and confer on, and maybe we can just  
22 come to an agreement. But I think there would need to be a  
23 process whereby we have reliable sampling at the end of the  
24 process, if we're in a position where we need to tee something  
25 up to Your Honor.

1           **MS. WEAVER:** Your Honor, I would make two proposals.

2           One is that when we refer to "sampling" here, we describe  
3           it as "the sampling procedure negotiated by the parties already  
4           in the ESI protocol," and I forget what docket number that is.

5           And, two, that we put a timeline, so that if they are  
6           going to do statistical sampling, there is a deadline for it  
7           and we move on or brief it.

8           **THE COURT:** Yeah. I think the timeline is fine. So I  
9           think maybe an agreement, but Facebook just doesn't want to be  
10          precluded from presenting that evidence because of revision.

11          So I'm not going to resolve that now. You try to revolve  
12          it. I'm going to give you a deadline to submit to me the stip  
13          or competing proposals, so that we get this done, like, soon.

14          **MS. WEAVER:** Good.

15          **MS. KUTSCHER CLARK:** That's perfect.

16          **THE COURT:** All right. And so I think that  
17          encompasses 6 then as well, paragraph 6. Well, Facebook's  
18          paragraph 6. So this is plaintiffs' paragraph 6, is to  
19          Ms. Davis's point about other sources of ESI that --

20          **MS. DAVIS:** Your Honor, I think our paragraph --

21          **MR. LOESER:** We have some numbering problems.

22          **MS. DAVIS:** Yes, I think --

23          **MS. WEAVER:** It's a little bit like the ballot counts,  
24          we went from 6 to 5 to 6.

25          **THE COURT:** Well, I hope the ballots are not like

1 that.

2 MS. DAVIS: Our first paragraph 6 is the same as  
3 Facebook's paragraph 7, I believe.

4 THE COURT: Okay.

5 MR. LOESER: Well, that's confusing.

6 MS. DAVIS: Then our second paragraph 6 is the other  
7 sources of ESI.

8 THE COURT: Right. So your second paragraph 5, then,  
9 should be 7: The parties will resume negotiations on the  
10 remaining RFPs.

11 I think we took care of that.

12 And then your -- what should be your paragraph 8, we can  
13 discuss that at the next one. We just need to get these  
14 additional custodians done, there. Then we'll move on.

15 They are going to begin the production of these.

16 And now -- okay. So I want you to submit your revised --  
17 what's today, Thursday -- stip --

18 MS. WEAVER: Yes.

19 THE COURT: -- by Monday.

20 MS. WEAVER: Okay.

21 THE COURT: I mean, you should meet today and see if  
22 you can resolve it -- by Monday, or competing proposals. Then  
23 I'll just pick and choose. Okay. By Monday.

24 MS. WEAVER: If we could, Your Honor, we do have the  
25 hearing in front of Judge Chhabria on Monday the 9th and we

1 might be a little preoccupied with that. Can we submit on the  
2 10th?

3 **THE COURT:** Yes.

4 **MS. WEAVER:** Okay. Thank you.

5 Another issue was the -- so that's the search terms.  
6 We're going to have a stip by Tuesday. Maybe even a president  
7 by Tuesday.

8 (Laughter.)

9 **MS. STEIN:** We'll see which comes first, Your Honor, a  
10 stipulation or a president.

11 **MS. WEAVER:** And if we want either.

12 **MR. LOESER:** Hey, I'll bet we can find agreement on  
13 who should be the president.

14 **THE COURT:** Oh. We are not going there, Mr. Loeser.  
15 We are not going there.

16 **MR. SNYDER:** We'll, we're not going there. But I will  
17 trade search strings for that.

18 (Laughter.)

19 **THE COURT:** We're not going there, Mr. Snyder.

20 Okay. On the fourth set of interrogatories, Facebook is  
21 going to amend the responses by November 20th. This is pretty  
22 key, important information, so this should be worked on  
23 forthwith.

24 **MS. STEIN:** Yes, Your Honor. We're working hard on  
25 those interrogatory responses. They are quite substantial.

1 And we did respond already to them; we're supplementing and  
2 responding to more.

3 **THE COURT:** Great. Good. Okay.

4 On the confidentiality of that document, while I agree it  
5 seems highly unlikely that Facebook is going to be able to show  
6 that it should remain sealed, we have a procedure in the  
7 protective order if the plaintiffs disagree with a  
8 confidentiality designation, and I just want you to follow it.  
9 I mean, that's probably --

10 (Unreportable cross-talk.)

11 **MS. WEAVER:** Your Honor, we agree. But, for us, it  
12 was a public document that we got from the NBC website. And  
13 the concern is, there are so many public documents in this  
14 case, that if we had public documents -- you know, are you  
15 asking us to search what Facebook has produced and compare -- I  
16 mean, we obtained this from an NBC website. And, again,  
17 Facebook has produced documents to regulators.

18 So we want to comply. We don't have a dog in this fight.  
19 If Facebook wants to designate these confidential, fine. But  
20 we're a little concerned about getting caught in a "gotcha"  
21 where we're using documents that are in the public domain, and  
22 Facebook produces them, after the fact, here, and calls them  
23 confidential. And --

24 **THE COURT:** Well, let me ask Facebook: Is there any  
25 more than this that you anticipate there being an issue, than



1 this document?

2 **MS. STEIN:** I would just say that there are more  
3 documents that might be an issue. The one that Your Honor  
4 previously looked at did have a cover page that said that it  
5 was under seal, which created, you know, certainly some of the  
6 issue.

7 I think, at the end of the day, you know, Facebook just  
8 wants to make sure we have an opportunity to brief this to  
9 Your Honor, with respect to our designations, in a fair way.  
10 Plaintiffs have been suggesting that we've waived the  
11 opportunity to brief it to you, which we obviously don't think  
12 that we have.

13 **THE COURT:** So I just said that you can brief it to me  
14 in accordance with. But, I'm going to rule and then that will  
15 give Facebook some guidance.

16 And to Ms. Weaver's concern, I'm just not going to let  
17 that happen.

18 **MS. WEAVER:** Okay.

19 **THE COURT:** Because that's going to be wasting my time  
20 and your time, and Facebook doesn't want to do that.

21 **MS. STEIN:** Yes, Your Honor.

22 **THE COURT:** So I think it's fair enough. This  
23 document seems to be a big issue for Facebook. We'll let them  
24 brief it and I'll rule on it. So you should just follow the  
25 procedure there.

1           **MS. WEAVER:** Yes, Your Honor.

2           **MR. LOESER:** Your Honor, just to -- I guess, a point  
3 of clarification on that. That all makes sense and I think  
4 that that's a path for how to deal with this document.

5           I think, what kind of seems to have been kind of missed in  
6 the process is that the protective order has a provision that  
7 refers to documents obtained publicly. So I just want to make  
8 it clear: We weren't -- we didn't view what we were doing as  
9 somehow not complying with the protective order. We were just  
10 following the provision that guided us on how to deal with  
11 documents not obtained from Facebook.

12           **THE COURT:** Fair enough. I mean, it's a somewhat  
13 unusual situation. That's fine. I think everybody was  
14 operating in good faith there.

15           **MR. LOESER:** Okay.

16           **THE COURT:** Let's see.

17           **MS. KUTSCHER CLARK:** Your Honor, one point of  
18 clarification there. We would respectfully request the  
19 opportunity to submit full briefing, on a full briefing  
20 schedule on this issue, because it is quite significant, as  
21 opposed to an expedited joint statement-type briefing.

22           **THE COURT:** When you say "full briefing" -- well, you  
23 mean, like a 35-day notice briefing, or how many pages, or -- I  
24 mean --

25           **MS. KUTSCHER CLARK:** I think we would request 10 to 15

1 pages, as opposed to two. Because the situation is quite  
2 complicated --

3 THE COURT: That's fine.

4 MS. KUTSCHER CLARK: -- and being litigated in the San  
5 Mateo Superior Court at the same time. There are a lot of  
6 moving parts and it's a very complicated issue.

7 THE COURT: All right. Do plaintiffs object to that?

8 MS. WEAVER: No, Your Honor.

9 THE COURT: Okay. All right.

10 MS. WEAVER: It does come up. You know, it came up in  
11 the *Constand v Cosby* case that we cited where, things like  
12 this, they become public through ways that are not desirable,  
13 and yet they are, then, public. So we just viewed this as the  
14 cat is out of the bag. But we don't want to dispute this. We  
15 would rather not make this into a sideshow. We would rather  
16 litigate the case.

17 THE COURT: All right. So you can do it then with  
18 regular briefing.

19 MS. KUTSCHER CLARK: Thank you.

20 THE COURT: Is there anything else we should discuss?

21 MS. DAVIS: Your Honor, I have a question just about  
22 the stipulation.

23 One thing we did not discuss -- or one thing I'm not  
24 entirely clear on -- are the additional RFPs for which search  
25 terms need to be proposed.

1 I understand your guidance that Facebook should include  
2 those in their proposal. We proposed a schedule for  
3 identifying those RFPs. And just to clarify, should that be  
4 part of stipulation that we submit on Tuesday, or will that be  
5 a separate process?

6 **THE COURT:** Are we talking about this round that we're  
7 negotiating?

8 **MS. DAVIS:** Yes.

9 **THE COURT:** Whatever you propose -- right -- should  
10 encompass those RFPs -- which, I think, was represented to be  
11 about an additional four --

12 **MS. DAVIS:** So --

13 **THE COURT:** -- and weren't already covered. So those  
14 should be included.

15 **MS. DAVIS:** So those should be part of Facebook's  
16 proposal then?

17 **THE COURT:** To the extent that they feel like they can  
18 do that. I mean, I suppose, to the extent you can give them  
19 some guidance, that would probably be helpful.

20 **MS. DAVIS:** Okay. Well, we'll include that schedule  
21 in our discussion. Thank you.

22 **MS. WEAVER:** Your Honor, there were two other related  
23 issues, I believe. One is just really kind of the scope of  
24 discovery that we're engaged in here.

25 With regard to RFPs that -- to which we believe documents

1 can be collected and produced that are not done with search  
2 strings, we have met and conferred and there are kind of two  
3 related issues.

4 One is, Facebook has actually, we understand, identified  
5 documents that can be collected without search strings, but  
6 they will not produce them until they produce documents  
7 collected by search strings. And we don't think that that's  
8 proper.

9 **THE COURT:** No. I understand that. That's why I said  
10 I'll address that at the next meeting.

11 **MS. WEAVER:** Okay. Fine.

12 **THE COURT:** I want to see that stip on the search  
13 string. I want that done. We'll address it at the next one.

14 **MS. WEAVER:** Okay. Fine.

15 **MR. LOESER:** Your Honor, one other matter that's  
16 probably worth a brief mention, and that's the issue of the  
17 relevant plaintiff user data.

18 And we've, obviously, read the order. I'm sure Facebook  
19 has read the order. We've started the process of meeting and  
20 conferring with Facebook.

21 Facebook has sometimes said that that other user  
22 information is massive and voluminous, and other times said  
23 nonexistent. And I think it's incumbent upon the parties to  
24 have substantive conversations about what they collect, what  
25 exists, what they are withholding, so that we can have a

1 reasoned conversation about, of the relevant information, what  
2 should be produced in this case.

3           **THE COURT:** Yeah. That needs to start moving now.  
4 That's why we briefed that for a while. Now you've got your  
5 answers, so let's get moving.

6           **MR. SNYDER:** And just to be clear, you know, we have  
7 been consistent and intend to be consistent and transparent in  
8 meeting and conferring about the user data. And I think we  
9 have already started those meet and confers, as I understand  
10 it. So, you know, certainly we agree that we should be meeting  
11 and conferring, agreeing, and then incorporating that in the  
12 search and production protocols.

13           There is another issue, Your Honor, I just want to raise,  
14 but not resolve, but, again, on the radar screen.

15           You know, we understand and really appreciate the  
16 deadlines and the clear rulings; it's very helpful. And also  
17 appreciate that the case schedule became unworkable, given the  
18 volume of documents and the negotiations. But, you know, the  
19 lack of goalposts is allowing, you know, to a certain extent,  
20 you know, a -- delays and inefficiency in the meet and confers.

21           And so we're going to start producing our documents and we  
22 are going to produce the next tranche, once we agree on  
23 everything there. And then we're going to be asking Your Honor  
24 to, you know, set a discovery end date, because we think  
25 deadlines are helpful and productive and -- you know,

1 litigation either loves or abhors a vacuum; but we, you know,  
2 think a vacuum is -- creates inefficiencies and delays.

3 So once we conclude our search string negotiations and  
4 know the volume of the documents that we will need to review  
5 and produce, we're going to be then asking the Court to solicit  
6 a revised case calendar, where we can have end-dates for  
7 discovery, and a new schedule.

8 **THE COURT:** Sure. And I think the plaintiffs want  
9 that as well. And so, basically, you can identify all the  
10 buckets that are left. So Ms. Davis identified another bucket  
11 which is these ESI that search terms aren't required for; there  
12 is the plaintiffs' user information; there is depositions and  
13 the like.

14 But I agree, we should get a new schedule. You know, see  
15 if you can jointly, to the extent you can, figure out a plan  
16 realistically for how -- when depositions are going to happen,  
17 how they are going to happen. I think Facebook mentioned  
18 they -- you are negotiating your expert stips or something.

19 But, no, I completely agree. I would like to set a  
20 realistic deadline that takes into account, and that we  
21 identify all the buckets that are out there, then, left, and  
22 how we can get that in.

23 **MR. LOESER:** And, Your Honor, Derek Loeser.

24 I don't want to pass up the opportunity to say it's  
25 wonderful when Orin and I can agree on something. And we

1 certainly agree that orders from the Court are very helpful.  
2 They provide clarity and guidance and should be adhered to by  
3 the parties; and that moves this along very efficiently. And  
4 also that a schedule is very important, and we look forward to  
5 having one. And this has been a -- I would say a slow and  
6 painful process for everyone, but we are getting there.

7 **THE COURT:** Yeah. We are getting there. Progress is  
8 being made and you're all getting along and -- nothing unusual.

9 I think the pandemic is, like -- it's been a long time now  
10 that we have all been doing this. Everything does seem to be  
11 requiring a little bit more guidance right now. This case is  
12 not alone at all -- at all with that. And we're just all tired  
13 and there is so much uncertainty.

14 I mean, remember when we first met? No one thought that  
15 we would be sitting here today like this. No one thought  
16 that --

17 **MR. LOESER:** No.

18 **THE COURT:** -- at all.

19 And I'm certainly -- everything I'm setting, scheduling  
20 now, I'm assuming it will be by video, you know, into next  
21 year. I'm just setting it by video. I think that's the way  
22 it's going to be.

23 But I do think, in a case like this, all that time and  
24 money to avoid flying -- at least for some of you who aren't  
25 here -- to San Francisco, it's a complete plus, and is a silver



1 lining of something that will enhance, I think, the  
2 cost-effectiveness -- not cost-effectiveness, but reducing  
3 unnecessary costs in litigation.

4 **MR. LOESER:** I would say there are two other  
5 significant pluses. One is the carbon footprint benefit from  
6 this, which is clear and wonderful; that's one silver lining.

7 The other is that I have learned to share much better with  
8 my children who come in to my office all the time and use my  
9 printer during hearings.

10 (Laughter.)

11 **MR. MONTGOMERY:** Your Honor, before we end, can I just  
12 clarify something that, hopefully, will make things simpler?

13 For the stipulation that you're anticipating, do you  
14 expect the parties to stipulate to the entire proposal that we  
15 have just gone through?

16 **MS. WEAVER:** What are we submitting on the 10th?

17 **THE COURT:** Oh. You each had submitted competing  
18 search term proposals, both as Exhibit A's. So it's that stip.

19 **MR. MONTGOMERY:** Okay. So it should be the whole --

20 **THE COURT:** And plaintiffs included some additional  
21 things that I said: Ms. Davis, not now.

22 So that would be out. Yeah. So that's what it is.

23 **MR. MONTGOMERY:** Okay.

24 **THE COURT:** That's the stip.

25 And I think there is very little left for you left to

1 negotiate. To the extent you can't resolve it, then just make  
2 competing; but, hopefully, you can resolve it.

3 **MR. LOESER:** One other, just, question for the Court  
4 is, we have been at this for a while now, and you have received  
5 a lot of joint statements from the parties. And if there is  
6 any guidance, if you feel the way it's being done is  
7 appropriate; that you're getting the information that you need;  
8 that it has too many adjectives or adverbs; any guidance you  
9 want to provide, we would be happy to hear.

10 **THE COURT:** No. I think it's working pretty well. I  
11 think it's working pretty well. Yeah, it's working. I have  
12 referred other cases, now, to this case to look at what you're  
13 doing.

14 **MS. WEAVER:** Who are those poor people?

15 (Laughter.)

16 **THE COURT:** I actually am fortune to have many MDLs  
17 these days that I'm managing the discovery.

18 **MR. SNYDER:** And, Judge, we want to express our  
19 appreciation to you jointly because you have been incredibly  
20 patient and helpful; and we know this can be mind-numbing and  
21 onerous. So we really do appreciate your helping us get  
22 through this.

23 **THE COURT:** You're welcome.

24 **MS. WEAVER:** We do agree on that.

25 **THE COURT:** Understand, I'm doing my best and you

1 won't always agree with it, but I truly am just doing my best.

2 MR. LOESER: Thank you.

3 THE COURT: So let's pick our next date. Would  
4 December -- Friday, December 4th, and we could do 8:30 a.m.?

5 I have closing arguments in a bench trial that I actually  
6 conducted the last two weeks of October, at 10:00 a.m. that  
7 day, which, by the way, the lawyering was excellent, and it  
8 went in very smoothly. Very smoothly.

9 MS. WEAVER: Wow.

10 THE COURT: Ms. Ekhaus is nodding. She was one of our  
11 court reporters. So just in case your clients are wondering  
12 about virtual -- at least bench trials, not a jury. Very  
13 smoothly.

14 MS. WEAVER: Good to hear.

15 MR. FALCONER: I did one this summer and it was  
16 smoother than any of us expected. It was great. It was a  
17 pleasant surprise how well the technology worked.

18 THE COURT: Yeah. So 8:30 on December 4th?

19 MS. WEAVER: That's fine here.

20 MS. KUTSCHER CLARK: That's fine, Your Honor.

21 THE COURT: Yeah. And the statement is due the day  
22 before, so we're not mucking up anyone's Thanksgiving.

23 All right. Happy Veteran's Day, Happy Thanksgiving, and  
24 stay safe.

25 MS. STEIN: Thank you, Your Honor.

1 MS. WEAVER: Thank you, Your Honor.

2 MR. LOESER: Thank you.

3 MS. KUTSCHER CLARK: Thank you.

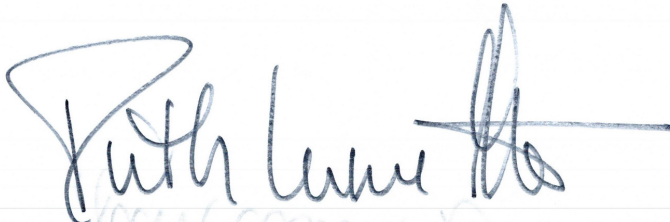
4 (Proceedings adjourned at 11:44 a.m.)

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6  
7 CERTIFICATE OF REPORTER

8 I certify that the foregoing is a correct transcript  
9 from the record of proceedings in the above-entitled matter.

10  
11 DATE: Saturday, November 7, 2020

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16 Ruth Levine Ekhaus, RDR, FCRR, CSR No. 12219  
17 Official Reporter, U.S. District Court  
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